

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

TRAVELERS INDEMNITY CO., *et al.*,

Defendants.

No. 2:14-cv-01957-BJR

**PLAINTIFF KING COUNTY'S  
PARTIAL JOINDER IN  
PROVIDENCE WASHINGTON  
INSURANCE COMPANY'S  
MOTION FOR ORDER  
APPROVING SETTLEMENT AND  
BARRING CONTRIBUTION  
CLAIMS BY NON-SETTLING  
INSURERS**

NOTE ON MOTION CALENDAR:  
October 5, 2018

**I. INTRODUCTION**

King County submits this Partial Joinder in Support of Providence Washington Insurance Company's Motion for Order Approving Settlement and Barring Contribution Claims by Non-Settling Insurers ("Motion"). After the County and Providence entered a Confidential Settlement and Policy Exhaustion Agreement dated August 29, 2018 ("Settlement Agreement"), Providence filed the Motion on September 13, 2018 with a Noting Date of October 5, 2018. Dkt. # 702. The Motion indicated that Providence's meet and confer efforts with the other insurers before it filed the Motion had not resulted in any party raising an objection to the Motion. Dkt. # 702, at 4. However, in case the Motion is opposed, the County hereby files this Partial Joinder.

**II. ARGUMENT**

**A. King County's Partial Joinder in Providence Washington's Motion**

King County joins in Providence Washington's Motion to the extent that it contends that, as recognized by the Washington Court of Appeals in *Puget Sound Energy v. Certain Underwriters at Lloyd's, London*, 138 P.3d 1068, 1079 (Wash. Ct. App. 2006) ("PSE"), courts have the authority under Washington law to impose a claim-bar order in favor of settling insurers against a non-settling insurer. *See* Dkt. # 702, at 5-7. The County further joins in the Motion to the extent that it:

- Reports that the Settlement Agreement between the County and Providence is reasonable and the result of arm's-length negotiations;
- Asserts that the interests of the non-settling insurers are protected. *See id.* at 9-11; and
- Seeks certification of the claims bar order as a final judgment regarding claims against and by Providence, because the County views that as a reasonable, though not necessary, element of the relief requested in the Motion. *See id.* at 11-14.

Accordingly, the County joins the Motion regarding the relief Providence seeks.

The County is not joining in the portions of the Motion, *inter alia*, that comment on or compare the settlements between the County and Providence to other settlements the County has reached in this case with other insurers. *See id.* at 7-9.

Providence's Motion is similar to other settled insurers' prior motions for approval of settlement agreements, claims bars and dismissals of claims in this case.<sup>1</sup> The Court granted each of these prior motions.<sup>2</sup>

**B. The Non-Settling Insurers' Interests are Adequately Protected**

As was true regarding King County's prior settlements in this case, the non-settling parties' interests are protected with respect to the County-Providence settlement for a number of reasons: (1) each non-settling insurer retains its coverage defenses and its ability to try to escape providing coverage to the County; (2) each non-settling insurer can seek contribution from each other; and (3) the County is not seeking or obtaining any "windfall" in this litigation. These three safeguards were recently found by the Western District to provide sufficient protection for the interests of non-settling insurers to enter a contribution bar order for settling insurers in another insurance coverage litigation. *Canal Indemnity Co. v. Global Development, LLC*, No. 2-14-CV-00823-RSM, 2015 WL 347753 (W.D. Wash. Jan. 26, 2015); *see also Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1225 (9th Cir. 1989) ("A bar order is appropriate only where the proposed settlement is reasonable and the interests of the non-settled defendants are protected.").

As in *Global Development*, the interests of the non-settling insurers in this case are sufficiently protected for those same three reasons.

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<sup>1</sup> These prior motions were filed by CNA (Dkt. # 386), Great American Insurance Company ("Great American") (Dkt. # 464), and Zurich Insurance Company ("Zurich") (Dkt. # 468).

<sup>2</sup> On March 1, 2017, the Court granted CNA's motion (Dkt. # 446), and on April 16, 2018, the motions of Great American and Zurich (Dkt. # 671).

1        *First*, all of the non-settling insurers have asserted several defenses to coverage.  
 2 Although King County disputes the merits of those coverage defenses, nothing in its  
 3 settlement agreement with Providence limits or interferes with the non-settling insurers'  
 4 ability to litigate and defend against the County's coverage claims.

5        *Second*, to the extent that the non-settling insurers are adjudicated to be obligated to  
 6 provide coverage, they may still seek contribution from each other.

7        *Third*, and most importantly, King County is not seeking any windfall or double  
 8 recovery in this litigation by achieving an insurance recovery that exceeds the amount of its  
 9 liability for damages in the underlying environmental claims. The County also previously  
 10 indicated to the Court and the non-settling insurers that, if necessary to ensure that the County  
 11 does not receive a double recovery, King County would agree at the end of this case when  
 12 calculating the damages owed by any remaining non-settled insurer to an appropriate setoff  
 13 for prior insurer settlement payments to the extent those prior payments relate to covered  
 14 costs for the tendered underlying claims at issue. (Dkt. #395, at 1-2). More specifically and  
 15 completely, while of course it is possible that the County's total liability for damages relating  
 16 to the underlying claims will exceed the total available limits of coverage, such that the  
 17 County could not receive any windfall, the County has stated in connection with the prior  
 18 motions that:

19        ... if, at the end of this litigation, setting aside any extra-contractual damages such as  
 20 bad faith claim damages,<sup>3</sup> the amount owed or to be owed by the non-settled insurers  
 21 would result in King County recovering more than its total liability for damages, **King**  
 22 **County would agree to a setoff based on prior insurer settlement payments to the**  
 23 **extent necessary to prevent a double recovery and to the extent those prior**  
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 26 <sup>3</sup> See *id.* at \*5 n.3 (noting that a non-settling insurer's potential "extra-contractual exposure is an additional factor supporting the fairness of a contribution bar.").

1           **settlement payments relate to indemnified damages arising from the underlying**  
 2           **claims at issue.**

3       *E.g.*, Dkt. # 395, at 5; Dkt # 415 at 3. Thus, King County has offered the non-settling insurers  
 4       significant protection in the form of an appropriate set-off to prevent a double recovery. In  
 5       granting the motions of Great American and Zurich, the Court, citing *Global Development*,  
 6       found that “these promises alone provide the non-settling Defendants with the protection to  
 7       which they are entitled.” Dkt. # 671, at 5-6.<sup>4</sup>

8           Thus, the interests of the non-settling insurers are protected in the same manner that  
 9       this Court has previously found to be sufficient in this case and that the Western District  
 10      found to be sufficient in *Global Development*.

11      **C.     It Would Be Premature and Unnecessary to Take Further Steps to Protect the**  
 12      **Non-Settling Insurers’ Interests at This Point**

13           It would be premature and unnecessary to take further action to protect the interests of  
 14       the non-settling insurers at this point. At this stage of the litigation, the parties do not know  
 15       what rights the insurers may have with respect to each other. That will depend in large part  
 16       upon how the parties and/or this Court resolve a number of factual and legal issues, including  
 17       the existence and terms of insurance policies (including limits of liability), the coverage  
 18       granted by those policies, the insurers’ various defenses to coverage, the total damages that

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19      <sup>4</sup> King County does not agree with the characterization of these representations in the  
 20       Declaration of David M. Schoeggl (Dkt. # 703) that Providence Washington filed in support  
 21       of the Motion. Specifically, Paragraph 8 of the Declaration provides in part: “This, together  
 22       with the County’s commitments regarding allocation, means that \$500,000 of the payment  
 23       will function as a credit against the other insurers’ potential indemnity obligations and  
 24       \$1,580,000 will function as a credit against the other insurers’ defense obligations.”  
 25       However, as set forth in this Partial Joinder and the County’s prior partial joinders to  
 26       contribution bar motions, the County is not agreeing to settlement credits to be applied at this  
      time. Rather, at the end of the case, subject to certain limitations such as extra-contractual  
      damages, the County would agree to a setoff based on prior insurer settlement payments to the  
      extent necessary to prevent a double recovery. Accordingly, the Providence Washington  
      settlement payment may result in a setoff for non-settled insurers against whom judgment is  
      entered at the end of the case. To the extent the Declaration implies that the County is  
      agreeing at this time to credits against the other insurers’ potential indemnity obligations and  
      ultimate defense obligations, the Declaration is not correct.

King County may recover, and the policy limits and attachment points of the non-settled insurers. Given those remaining issues, and apart from the fact that non-settling insurers' interests are already sufficiently protected, it is unclear what, if any, further protections could be offered to the non-settling insurers at this stage of the litigation. The Court recognized this timing issue and declined to make a ruling on whether a set-off was appropriate or the amount of any such set-off in its Orders granting CNA's motion (*see* Dkt. # 446, at 6) and the motions of Great American and Zurich (*see* Dkt. # 671, at 6).

Furthermore, any additional efforts to protect the non-settling insurers' interests may conflict with the insurers' joint-and-several coverage obligations for all environmental defense and indemnity costs under Washington law. In *American National Fire Insurance Co. v. B&L Trucking & Construction Co.*, 951 P.2d 250 (Wash. 1998), a policyholder with multiple liability policies issued across several policy periods sought coverage for environmental property damage that had occurred over several years. *See id.* at 256. The Washington Supreme Court held that "once a policy is triggered, the policy language requires [the] insurer to pay all sums for which the insured becomes legally obligated, up to the policy limits. *Id.* Moreover, "Once coverage is triggered in one or more policy periods, those **policies provide full coverage for all continuing damage.**" *Id.* (emphasis added). As a result, under Washington law, each of the insurers in this case are obligated to provide full coverage for all of King County's defense and indemnity costs up to their policy limits. Stated somewhat differently, each insurer's respective obligation to provide full coverage to the County up to its policy limits is not impacted by the coverage that may or may not be provided by another insurer's policies.<sup>5</sup> Given the protections already in place, any further

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<sup>5</sup> In *Global Development*, the court rejected an argument that setoffs should be calculated based on each insurer's percentage of liability for the total amount of damages. *See Global Development*, 2015 WL 347753 at \*5 n.4. The court reasoned that "such an approach is typically not workable in an insurance coverage cases, where all insurers on risk during the period of damages are jointly and severally liable for the entire jury verdict, up to their policy

1 efforts to protect the non-settling insurers may undermine King County's right to receive full  
 2 coverage from its insurers.

3 **D. The Claim-Bar Order Will Promote Further Settlements**

4 As discussed in Providence's Motion, Washington courts recognize that claim-bar  
 5 orders promote settlement by preventing a settling party from being brought back into  
 6 litigation by non-settling parties. *See* Dkt. # 702, at 5-6. The County reasonably anticipates  
 7 that it may reach settlements with additional insurers before the end of this litigation.  
 8 Continuing to establish a precedent that settling insurers will likely receive the protection of a  
 9 claim-bar order will promote future settlements. However, if Providence's request for a  
 10 claim-bar order is denied, insurers may be less willing to settle the County; the possibility of  
 11 another non-settling insurer dragging them back into the litigation will be a strong  
 12 disincentive to settlement. The County believes that Providence's requested claim-bar order  
 13 will promote the efficient resolution of this case through additional settlements.

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25 limits, making it impossible to assign percentage culpability as in a securities action." *See id.*  
 26 (citing *PSE*, 138 P.3d at 1079).

1 **III. CONCLUSION**

2 For reasons discussed in the Motion and for the reasons set forth in this Partial  
3 Joinder, the Motion should be granted, and the Court should enter an order barring and  
4 dismissing claims in this case against and by Providence Washington under the settled  
5 Providence Policy (as defined in the Motion).

6 Dated: September 20, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 20, 2018, I electronically filed this Partial Joinder in Support of Motion for Order Approving Settlement and Barring Contribution Claims by Non-Settling Insurers using the Court's CM/ECF system, which will send notification to all parties of record.

Dated this 20th day of September, 2018.

s/ John Bjorkman

John Bjorkman, WSBA # 13426